

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 393
3050472

BETWEEN RAMESH NATH
 Applicant

AND VISHNUPRIYA LIMITED trading as
 THE SPICE ROOM
 Respondent

Member of Authority: Andrew Dallas

Representatives: Applicant in person
 Meetu Saklani for the Respondent

Investigation Meeting On the papers

Date of the Determination 2 July 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Vishnupriya Limited trading as Spice Room, operates restaurants in Wanaka and Queenstown. The directors and shareholders of Spice Room are Meetu Saklani and Abhishek Saklani. Spice Room employed Remesh Nath on a supported work visa as chef at its Wanaka restaurant between September 2016 and April 2018. Mr Nath says he was unjustifiably dismissed while on annual leave. Mr Nath says he is also owed unpaid wages due to working more hours than was he was paid for during his employment. Spice Room denied these claims.

The Authority's investigation

[2] During a case management conference, and including for reasons that Mr Nath is now resident in Canada, the parties agreed that this matter would be heard "on the papers" under s 174(D) of the Employment Relations Act 2000 (the Act) and directions were given by the Authority to give effect to that.

[3] Having regard to s 174E of the Act while I have not referred to all the evidence received from witnesses or the submissions advanced by the representatives in this determination, I record that I have fully considered this material.

Issues

[4] The issues that arose for determination during the Authority's investigation were:

- (i) Was Mr Nath's dismissal, and how the decision was made, what a fair and reasonable employer could have done in all the circumstances at the time?;
- (ii) If Spice Room's actions were not justified, what remedies should be awarded to Mr Nath, considering:
 - (a) Lost wages; and
 - (b) Compensation for hurt, humiliation and injury to feelings; and
- (iii) Is Mr Nath owed wages by Spice Room and if so, in what amount?

What caused Mr Nath's employment relationship problem with Spice Room?

Mr Nath's dismissal by Spice Room

[5] On 14 March 2018, Mr Nath applied for annual leave via email from 9 April 2018 to 11 July 2018. Mr Saklani approved this leave also via email. Mr Nath thanked Mr Saklani for approving his leave, bought a return plane ticket and travelled to India. Mr Nath said it was always his intention to return to his employment and he did not say or do anything to suggest otherwise.

[6] While Mr Nath was away from Wanaka, Spice Room employed another chef to replace him. Despite Mr Saklani approving Mr Nath's leave, Spice Room claimed he was not coming back. Evidently, it arrived at this conclusion on the basis that Mr Nath had not contacted it during his period of leave. Mr Nath said he was under no obligation to do so.

[7] Spice Room's position here appears to be undermined by its written statement to the Authority which said Mr Nath gave *notice* under his employment agreement by "giving us notice" he intended to take annual leave and then by "going on holiday to India".

[8] According to Spice Room while Mr Nath was away, Mr Saklani fielded a phone call from a person who said they were from Immigration New Zealand (INZ). Evidently the person asked if Spice Room employed Mr Nath to which Mr Saklani confirmed it did but he "was not sure [Mr Nath] was coming back. Spice Room said it did not realise that at the time (on or about 9 July 2018) Mr Nath was at Hong Kong airport seeking to board a plane for Auckland. Mr Nath said the person from INZ advised him Mr Saklani said in response to the question: "we don't guarantee the job and I don't think he will be back". Mr Saklani denied this.

[9] At that point, or very soon thereafter, Mr Nath was denied boarding to the plane and he said he was told his work permit had been cancelled. Mr Nath said he then spent a very miserable 36 hours at Hong Kong airport before boarding a plane for India.

[10] Spice Room denied Mr Nath's allegation that it contacted INZ to advise he was not returning to his employment. On the contrary, it said it wanted him to return.

Additional hours worked but not paid

[11] Under the terms of his employment, Mr Nath was guaranteed 30 hours per week over a 7-day cycle. In exchange for this, Mr Nath was paid \$36,900 per annum plus accommodation and food. The agreement did not specify the value of the accommodation and food.

[12] Mr Nath said he worked between 50 and 60 hours per week for Spice Room but was still only paid for 30 hours. Mr Nath provided calculations setting out the extra hours he worked during his employment with Spice Room. Based on these calculations, Mr Nath said he was owed \$54,238.06 in unpaid wages.

[13] Spice Room accepted it did not keep wage and time records for Mr Nath but said he did not either. Payslips were provided for Mr Nath but these simply reproduced the figure representing 30 hours work per week. Spice Room said Mr Nath's annual salary based on a 30 hour week was above the minimum wage and it would require "a lot of extra hours before the minimum wage threshold is reached". Spice Room also said its employees "indirectly" pay for accommodation, electricity, gas and two meals per day, which it valued at "\$300 per week", by "extra hours worked". It also said due to Wanaka being a "holiday town", hours worked by staff above "35 to 40" a week varied and as a result some weeks these wages offset the value of the accommodation and food and some weeks it did not. Spice Room said these effective underpayments for accommodation and food averaged out over time.

[14] In an attempt to bolster its opposition to Ms Nath's claim for unpaid wages, Spice Room also provided statements from three other employees on supported work visas it said were happy with the arrangements in place.

The Authority's view of Mr Nath's employment relationship problems

Mr Nath's dismissal

[15] The primary issue before the Authority is whether Mr Nath's dismissal was justified. The test of justification under s 103A of the Act is to be applied on an objective basis by considering whether the employer's actions were what a fair and reasonable employer could have done in all the circumstances.

[16] Spice Room's primary defences to Mr Nath's allegation of unjustifiable dismissal were (a) that it believed he had resigned by giving notice to go on annual leave or (b) in the alternative, Mr Nath was under an obligation to communicate when he intended to return from his annual leave, he did not do so and, therefore, it was entitled to conclude he was not coming back. However, both propositions are directly contradicted by (i) its own email exchange with Mr Nath about his leave, (ii) he never committed to communicating about his return date (and, as a matter of fact, this was already known to Spice Room) and (iii) that he was not otherwise under any obligation to do so.

[17] It is clear on the evidence, Spice Room found it more convenient to employ another chef to replace Mr Nath than await his return. When Spice Room was contacted by INZ on or about 9 July 2018, the statements made on its behalf plainly and directly contributed to Mr Nath being denied boarding to New Zealand and having his work permit cancelled. Whether Spice Room did this intentionally or recklessly, neither are the actions of a fair and reasonable employer nor are they consistent with good faith owed by an employer to an employee under the Act.

[18] Ultimately, I find Spice Room cannot justify Mr Nath's dismissal and he was, therefore, unjustifiably dismissed.

Remedies

[19] As Mr Nath has been found to have a personal grievance, he is entitled to an assessment of remedies.

Lost wages

[20] Consistent with the Act, Mr Nath sought three months lost wages as one remedy for his personal grievance. I accept based on the evidence he made a reasonable attempt to mitigate the loss of his employment even in circumstances where he was precluded from returning to New Zealand; to the extent this was necessary, if it is.

[21] Subject to any contribution, Spice Room must pay Mr Nath three months pay on the basis of the following calculation: 13 weeks x \$801.92¹ = \$10,424.96 gross.

¹ \$801.92 based on most recent payslips representing payment for 30 hours per week.

Compensation for hurt, humiliation and injury to feelings

[22] Mr Nath sought compensation for hurt, humiliation and injury to feelings arising out of the termination of his employment by Spice Room. He did not specify a compensatory figure in his statement of problem.

[23] I accept Mr Nath was devastated by the loss of his employment. It is clear he had begun to establish a life for himself in New Zealand and this was taken away from him. The circumstances of his dismissal, while on annual leave, how this was communicated to him at Hong Kong airport, after he was denied boarding, and his former employer's subsequent attempts to shift the blame onto him were completely unacceptable.

[24] Taking these matters and other surrounding circumstances into account it is appropriate for Spice Room to pay Mr Nath \$22,000 under s 123(1)(c)(i) of the Act. This award is made mindful of an upward trend in awards being made by the Authority under s 123(1)(c)(i) of the Act and general guidance from the Employment Court as to how to approach the setting of appropriate compensatory amounts.

Contributory conduct by Mr Nath?

[25] Having found that Mr Nath was entitled to a remedy for a personal grievance for unjustified dismissal, I was required by s 124 of the Act to consider whether he contributed to the situation giving rise to his grievance.

[26] There was no evidence before the Authority of any conduct by Mr Nath that contributed to the termination of his employment by Spice Room. Consequently, no deduction for contribution is made.

Mr Nath's claim for unpaid wages

[27] Mr Nath's claim for unpaid wages is straightforwardly answered with reference to two statutory provisions.

[28] Section 7 of the Wages Protection Act 1983 provides that wages must be paid in money. There was no evidence of a service tenancy between Spice Room and Mr Nath and, as previously stated, his employment agreement did not deal with these matters. Further, there was also no evidence the parties reached agreement about the

value of the food and accomodation, how this amount would be added to Mr Nath's gross wages and what appropriate deduction would be made for it. Consequently any and all deductions made by Spice Room from Mr Nath's wages during this employment to cover food and accomodation were inconsistent with its obligations under the Wages Protection Act.

[29] Spice Room failed to produce wage and time records to assist Mr Nath in the calculation of the claim for unpaid wages and holiday pay. In the absence of such records and any other information from Spice Room disproving the claim and in reliance on s 132(2) of the Act, I accept Mr Nath's claims for unpaid wages. Spice Room must pay Mr Nath \$54,238.06 gross as unpaid wages.

Other claims

[30] Mr Nath claimed reimbursement for other monies including for several airfares arising out of his holiday. However, I find these are not sufficiently causally linked to his personal grievance or otherwise connected with his employment with Spice Room to be dealt with in this jurisdiction.

Summary of orders

[31] Spice Room must pay Mr Nath the following amounts within 28 days of the date of this determination:

- (i) As a remedy for his personal grievance, \$10,424.96 gross as reimbursement for lost wages under s 128(2) of the Act;
- (ii) As a further remedy for his grievance, \$22,000 as compensation for hurt, humiliation and injury to feelings under s 123(1)(c)(i) of the Act; and,
- (iii) Underpayment of wages in the amount of \$54,238.06 gross.

[32] In relation to orders (i) and (iii), Mr Nath is to contact the Department of Inland Revenue (IRD) and make arrangements to pay the applicable amount of PAYE taxation on these amounts. IRD can be contacted via its website: www.ird.govt.nz or via telephone: +64 4 9780779.

Certificate of Determination

[33] The Authority officer is directed to prepare a Certificate of Determination setting out the orders made in paragraph [31] above.

Costs

[34] As neither party was represented, there is no issue as to costs.

Andrew Dallas
Member of the Employment Relations Authority